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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR MANUEL RENDEROS, Defendant and Appellant.	A097873 (Solano County Super. Ct. No. VC153448)
In re VICTOR MANUEL RENDEROS, on Habeas Corpus.	A103588

In this case we hold Penal Code section 803, subdivision (g) (section 803(g)), does not violate ex post facto principles when it is used to extend the unexpired time in which criminal charges may be brought for certain offenses involving substantial sexual conduct against minors.

After a jury trial, Victor Manuel Renderos was found guilty of 26 counts of sex offenses against a child under the age of 14 years, as designated in section 803(g). The usual statute of limitations for the offenses was six years under Penal Code, section 800. Before the six-year period expired for each offense, however, section 803(g) was enacted. Section 803(g) permits the filing of a criminal complaint within one year of the victim's report of the offenses so long as the offenses involve defined substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the

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* This opinion is certified for partial publication only. (Cal. Rules of Court, rules 976(b) and 976.1.) The portions to be published are the three paragraphs of the introduction of the opinion, Part I.A. of the Discussion, and the Disposition.

allegations. Based upon its true findings the section 803(g) requirements had been met for each offense, the jury determined the People had timely commenced the prosecution.

By a separate motion, Renderos now seeks summary reversal of his convictions, arguing the prosecution was barred by the six-year statute of limitations and any extension under section 803(g) was unconstitutional. In the published portion of the opinion, we conclude the application of section 803(g) to the offenses for which defendant was convicted does not operate as an ex post facto law. In the unpublished portion of the opinion, we conclude there is no merit to Renderos's additional arguments challenging his convictions and sentences; and we summarily deny his petition for a writ of habeas corpus based upon a claim his trial counsel was ineffective.

FACTUAL AND PROCEDURAL BACKGROUND

In the 1990s, Renderos, then in his early fifties, dated Lisa C., who had two children, Ryan, who was under 14 years old, and his younger brother, Jordan. Renderos spent a lot of time with Lisa and her sons. On an almost daily basis, after he finished work, Renderos went to Lisa's home for dinner and he then spent the evening with Lisa and her sons before he returned to his home. Renderos was also present at holiday dinners and birthdays and he took trips with Lisa and her sons. Ryan thought of Renderos like a father. However, over a two-year period from May 1992 continuing to mid-September 1994, Renderos molested Ryan on numerous occasions.

Ryan was eighteen years old at the time of trial. He described in detail the first two incidents that happened when he was eight years old.

The first incident occurred during a family trip to the Russian River. According to Ryan, it was spring but hot enough to go swimming. While Lisa remained on shore, Renderos and Lisa's sons went canoeing and then stopped near some bushes to urinate. Renderos and Ryan were standing at one bush, while Jordan was standing nearby at another bush. After urinating, Renderos took Ryan's hand, placed it on his (Renderos's) penis, and told Ryan to keep his hand there. Ryan left his hand there for a few seconds

and then removed it. Driving home, Ryan rode with Renderos in his truck while Lisa and Jordan rode home in her car. Ryan did not tell anyone about the incident.

The second incident occurred about two months later. Renderos was at Ryan's home for the nightly dinner with the family. After dinner, Ryan's mother left the house to attend to her real estate business. Ryan was in his bedroom changing his clothes when Renderos came in. Renderos reached through the opening in Ryan's boxer shorts, and pulled on Ryan's penis for a few seconds. Renderos then had Ryan place his own hand on Renderos' penis, and "jack [Renderos] off" until he ejaculated. No words were spoken during this incident. Ryan then got dressed, and he went into another room to watch television. Ryan did not say anything to anyone about the incident.

The sexual abuse, which Ryan described as "touching, the[n] me jacking him off," continued on a more frequent basis as Ryan got closer to nine, with the third incident happening "a little bit after" the second incident, and then on an almost nightly basis, "at least once every three days." Ryan, however, was unable to recall how many times he was molested while he was still eight years old. But, he testified the abuse occurred from the time he was eight years old . . . "[a]nd it started stopping when [he] was getting close to eleven. When [he] got to eleven, it just stopped." Ryan further testified from the time the sexual activity started until the time it ended, it occurred each month during that period of time; and once the molestation started, there were never any months when Renderos did not molest him.

In addition to the forced masturbation, Ryan testified he was eight to nine years old when Renderos first used his finger to penetrate Ryan's rectum. When Ryan was nine or ten, on one occasion he was forced to orally copulate Renderos, on a few occasions Renderos used his finger to penetrate Ryan's rectum, and on one occasion Renderos used his penis to penetrate Ryan's rectum.

About one year before the trial, when Ryan was seventeen, his girlfriend confided she had been molested, and in response, Ryan told his girlfriend he too was molested. His girlfriend encouraged Ryan to tell his mother about Renderos's conduct. Ryan testified once he spoke with his mother, "all my problems just stopped almost." Ryan

had not previously said anything to his mother about the sexual abuse because he was afraid he would get into trouble and because the incidents made him feel gay. Ryan further testified a few months after the Russian River incident, Renderos told him not to talk about their sexual encounters; Renderos said he (Renderos) would get in trouble and Ryan should not discuss the matter with his mother. According to Detective James Matthews, Jr., Ryan reported he thought Renderos would kill his mother if he said anything about the abuse.

On March 19, 2001, Ryan reported the abuse to the police who recorded a statement from Ryan. One month later on April 20th, at the police station, Detective Matthews had Ryan place two telephone calls to Renderos in which Ryan asked Renderos whether he remembered the molestations and why Renderos had molested him. During the first telephone call, Ryan questioned Renderos about the first incident at Russian River and why Renderos always touched Ryan when he was little. Renderos at first stated he did not remember the trip or always touching Ryan when he was little. Renderos then stated, "But don't worry about shit like that, Man. That was something that, you know, happened a long time ago and that you -- we just did some playing around, you know? . . . No big thing." Ryan prefixed the second telephone call by asking Renderos for counseling on a problem. To which Renderos told Ryan, "Hey, come on over, Man. You know . . . things like that happen -- Hey, it was just -- you was crazy at the time. You remember that. . . . You know, you were crazy and you want to experiment things, you know and things like that. You're the one that motivated the whole thing, you know? Just let the guilt out of your head." Ryan then stated he was having sexual problems with his girlfriend, to which Renderos replied Ryan should not smoke any dope. Ryan replied he had not used any dope for six or seven months. When Ryan further stated he was bothered by Renderos's act of "always like make me put my hand on your penis . . . ," Renderos replied, "Oh well, you know? You -- You wanted to do that. You know remember? You wanted to." When Ryan said he was eight years old, Renderos claimed: "You were about 12, Man. You were old, already. . . . I didn't meet you when you was eight. You were older than that." When Ryan again stated it was not

normal for guys to grab each other's dicks, Renderos replied, "Oh, it's a -- I know. Yeah, I couldn't figure out why you want to do it. Remember that?" When Ryan said he did not really want to do it but Renderos got his hand, Renderos relied, "No, you're . . . the one. You started out, remember, you wanted to experiment crazy things. You . . . were always doing crazy things. Remember that? When Ryan again said he did not understand why Renderos wanted Ryan to try to suck his dick because it was like Renderos was using Ryan to get what he wanted, Renderos replied, "Oh, no, no, no, no, no. Huh-uh. No, no. You got me wrong. You want to experiment things. You want to fuck around with this. You want to do that. You want to do this. You want to do that. [¶] You're the one that always wanted it. Remember the way you are, Man. The way you used to be. [¶] You want to do this, you want to do that. . . . I didn't force you into doing anything. You're the one that motivated everything. [¶] Think about that." Ryan stated he did not know how he had motivated the sex because he was young, to which Renderos replied, "Well, you knew what you were doing, 'Bro." The remainder of the telephone conversation, which is set out in the margin of the opinion, continued in the same vein, with Ryan continuing to ask Renderos if he remembered the sexual encounters, and Renderos telling Ryan to forget about the incidents.[1] Five days after the

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1 The relevant part of the transcript of the recorded second telephone call reads as follows:

Q. [Ryan]: . . . I just think it's not normal for like you know, an older man to grab a kid's hand and put it on his dick.

A. [Renderos]: Oh, forget about that shit, you want to . . . do things like that when you were younger, you want to do this, you want to experiment different things.

Q. But then remember, you would grab my dick, too. I mean --

A. You forget about these things. Just forget about those things and -- like I tell you, concentrate on now. Don't - - forget about then. Forget about that shit, Man. Concentrate on your girl. . . .

* * * *

Q. I just don't get why you would grab me and shit, you know? That just bothers me.

A. Well, just forget about that shit, Man. Forget about the shit. Hey, come on over some day and we talk about it and get this in the open.. . .

Q. You're not [g]ay, are you?

A. Fuck, no. . . .[¶]

Q. Yeah?

A. I love pussy, Man. You know me better than that. . . .

telephone conversations, on April 25, 2001, the People filed a criminal complaint against Renderos, charging him with various felony sex offenses.

Renderos testified on his own behalf and denied molesting Ryan on any occasion. He claimed he met Lisa somewhere around 1992 or 1993, and he dated her for about three or four years. Renderos could not recall how old Ryan was when he first met the boy; he claimed Ryan must have been around ten years old. He confirmed Ryan's testimony that after he started dating Lisa, he ate dinner at Lisa's home on an almost nightly basis. However, Renderos claimed that practically every night he was at Lisa's home, after the boys were asleep, he and Lisa had intimate relations in her bedroom and then he left at about 11:00 p.m.[2] Renderos claimed Lisa did not work "that much" at night. He recalled caring for the boys on only five occasions.

Renderos explained his statements in the recorded telephone calls with Ryan referred to incidents that took place when Ryan was eleven or twelve years old. Specifically, on a few occasions, after having sex with Ryan's mother, Renderos came out of Lisa's bedroom to find Ryan outside the bedroom door. Renderos recalled Ryan saying, "[H]ow do [you] like my mother's . . . female part." Then, Ryan would grab Renderos's penis through his clothes. Renderos told Ryan to stop touching him. The incidents happened on five occasions and then they just stopped. Renderos told Lisa about the incidents, suggesting they have intimate relations later in the evening. During the two telephone calls with Ryan in April 2001, Renderos thought Ryan was referring to

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Q. But then why'd you grab me, Dude?

A. Forget about things like that. You were grabbing me you know and I was, you know, we were just fuckin' around and just forget about that shit.

Q. All right. All right.

A. Put it in the . . . past, forget about it, don't think about it and then when you want to [b]ullshit, come on over we can talk about it and . . get it in the open between you and me and then . . . it won't bother you no more.

2 Ryan's mother testified she usually had intimate relations with Renderos at his home and not in the presence of the children. She further testified there might have been a time when she was intimate with Renderos in her home after the children went to bed but she could not recall any such occasion.

the incidents when Ryan had waited for him outside Lisa's bedroom and grabbed his penis as he emerged from the room. Renderos claimed all the statements he made on the tape were references to those incidents instigated by Ryan.

Renderos was found guilty of one count of committing continuous sexual abuse (during a four month period when Ryan was eight years old), one count of oral copulation (when Ryan was nine or ten years old), one count of sexual penetration with a foreign object (when Ryan was ten years old), and 23 counts of committing a lewd act on a child under 14 (each count covering a one-month interval from September 1, 1992 through July 31, 1994 when Ryan was eight, nine, and ten years old). The jury also found true factual allegations under section 803(g) making the prosecution timely as to each offense of which they found Renderos guilty.[3] The trial court sentenced Renderos to an aggregate term of 66 years in prison.

DISCUSSION

I. Timeliness of Prosecution

A. Statutory Extension of Statute of Limitations

Renderos was convicted of felony sex offenses in violation of Penal Code sections 288, 288a, 289, and 288.5[4], committed between May 1, 1992 and September 19, 1994. Under section 800, the People were required to commence prosecution within six years of the commission of the offenses. However, before the six-year period in section 800 expired for any of the offenses, the Legislature enacted section 803, subdivision (g) (section 803(g)). (Stats. 1993, ch. 390, § 1, eff. Jan. 1, 1994, amended Stats. 1996, ch. 130, § 1, eff. Jan. 1, 1997, and Stats. 1997, ch. 29, § 1, eff. June 30, 1997.) Section 803(g) currently provides, in relevant part: "(1) Notwithstanding any other limitation of time in [section 800 or 801], a criminal complaint may be filed within one year of the

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3 Because the jury was unable to reach a verdict on count two (alleging an act of sexual penetration with a foreign object when Ryan was nine years old), the trial court declared a mistrial on that count. Renderos was also charged but acquitted of one count of furnishing marijuana to a minor over the age of 14 years.

4 All further unspecified statutory references are to the Penal Code.

date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. [¶] (2) This subdivision applies only if . . . [¶] (A) The limitation period specified in Section 800 or 801 has expired."

After Renderos filed his opening brief and the People filed their responsive brief, Renderos moved for summary reversal of the convictions, relying upon the United States Supreme Court's ruling in *Stogner v. California* (2003) 539 U.S. __. 123 S. Ct. 2446 (*Stogner*). In an order dated July 7, 2003, we deferred ruling on the motion. We now deny the motion for summary reversal.

In *Stogner, supra*, the United States Supreme Court held ex post facto principles barred the application of section 803(g) to those cases where the statute of limitations on the charged offenses had expired before January 1, 1994. (*Stogner, supra*, 539 U.S. ___, 123 S. Ct. at p. 2461.) The court, however, expressly noted its holding did not affect or otherwise "prevent the State from extending time limits . . . for prosecutions not yet time barred." (*Id*. at p. , 123 S.Ct. at p. 2461.) Thus, the only consequence of *Stogner* is that any enumerated crime must be committed or the limitations period in section 800 or 801 must expire after January 1, 1994 (the effective date of the statute) in order for the extended one-year period to apply. Because the limitations period in section 800 for all the offenses charged in this case expired after January 1, 1994, section 803(g) does not violate any constitutional provision against *ex post facto* laws.[5] (See, also, *Harris v. Superior Court* (1988) 201 Cal. App. 3d 624, 630, fn. 3; *People v. Lewis* (1986) 180 Cal.App.3d 816, 822-823; *People v. Sample* (1984) 161 Cal.App.3d 1053, *People v. Eitzen* (1974) 43 Cal.App.3d 253, 266-267.)

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5 Although the 1996 amendment to the statute expressly made section 803(g) retroactive to all offenses committed before, on, or after January 1, 1994 (§ 803(g)(3)(A)), that amendment did not change but merely clarified the effect of the 1994 law. (*People v. Frazer* (1999) 21 Cal.4th 737, 753, abrogated on other grounds in *Stogner, supra*, 539 U.S. at p. , 123 S. Ct. at p. 2453.)

Renderos acknowledges "the Legislature could probably have enacted an extension of the statute of limitations in section 800 in 1994 that would have survived a challenge as an ex post facto law." He contends, however, section 803(g), by its express terms, cannot be read as merely "extending" or "tolling" the statute of limitations for crimes committed before January 1, 1994, where the limitations period under section 800 or 801 had not expired. He premises his argument upon two factors: (1) the proviso in subsection (2) of section 803(g) that subdivision (g) applies only if "the limitation period specified in Section 800 or 801 has expired; " and (2) because there must always be an interim period in which the prosecution is time-barred (between the expiration of the statute of limitations in sections 800 or 801 and the filing of a report by the victim), section 803(g) cannot be interpreted as a "toll" or "extension" of the six year statute of limitations. Thus, he argues section 803(g) can only be read as "reviving" time-barred actions, which is prohibited by the ruling in *Stogner*. We conclude the statute can be read to withstand Renderos's ex post facto challenge.[6]

Subdivision (g) of section 803, provides: "*Notwithstanding any limitation"* in section 800 or 801, the People may pursue a prosecution of certain sexual offenses involving minors within one year from the time a victim files a report. The proviso that the subsection does not apply unless the statute of limitations has expired in section 800 or 801 "obviously ensures that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 or 801 where the victim reports the crime to a qualifying law enforcement agency before the three-year or six-year period set forth in the latter provisions 'has expired.' In this way, the limitations period in section 803(g) - like other 'tolling' and 'extension' provisions in the same statute - serves to prolong, rather than shorten, the time in which a felony child molestation prosecution may be commenced." (*People v. Frazer, supra*, 21 Cal.4th at p. 752.) Thus, for those offenses

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6 Renderos does not challenge the application of section 803(g) on the ground the law should not be given retroactive effect, an argument recently rejected by the Fifth District in *People v. Robertson* (2003) 113 Cal.App.4th 389.

committed before January 1, 1994, but where the statute of limitations in sections 800 or 801 had not yet expired as of that date, section 803(g) can be read as "extending" the statute of limitations so that a prosecution is timely if it is commenced no more than one year after a victim reports the abuse to an appropriate law enforcement agency. That the People could not prosecute the action until a report was filed by Ryan (*Ream v. Superior Court* (1996) 48 Cal.App.4th 1812, 1819), does not support Renderos's contention the statute as applied to him had the effect of "reviving" a prosecution barred by the statute of limitations. Because the statute of limitations under section 800 had not expired when section 803(g) became effective on January 1, 1994, section 803(g) permitted the People to commence prosecution for the offenses within one year after the filing of Ryan's report of abuse, notwithstanding the limitation period in section 800.

B. Sufficiency of Evidence Supporting Timeliness of Prosecution

Renderos attacks the sufficiency of the evidence to support the jury's true findings of the section 803(g) allegations, arguing the prosecution failed to prove the corpus delicti of section 803(g),[7] and therefore he was deprived of due process of law under the Fifth and Fourteenth amendments of the federal constitution. He relies upon the rule the corpus delicti of a criminal offense must be established independent of the extrajudicial statements of a defendant. Based upon this premise, he argues the People improperly relied exclusively upon his extrajudicial statements as corroboration of Ryan's allegations and failed to present any other "independent evidence" of corroboration. We conclude the corpus delicti rule does not apply to the factual allegations in section 803(g), and therefore, the People did not have to produce any corroborating evidence "independent"

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[7] Section 803(g) applies only if "[t]he crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.66, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegations. No evidence may be used to corroborate the victim's allegations that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals." (§ 803, subd. (g)(2)(B).)

of Renderos's extrajudicial statements. Consequently, Renderos was not deprived of due process of law.

"The corpus delicti of a crime consists of two elements, the fact of the injury, loss or harm, and the existence of a criminal agency as its cause. [Citation]. It must be proved independently of the extrajudicial statements of the defendant. [Citation.]" (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1175.) "[T]he corpus delicti rule is designed to provide independent evidence that the crime occurred, not help to determine whether the statement was made. Its principle reason is to ensure 'that the accused is not admitting to a crime that never occurred.' (*People v. Jennings* (1991) 53 Cal.3d 334, 368 [ ]; see *People v. Manson* (1977) 71 Cal.App.3d 1, 42 [ ] [The rule 'guard[s] against a defendant confessing to a crime which was never committed.']." (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 (*Carpenter*).)

Contrary to Renderos's contentions, the issue of whether the jury could convict him based upon his extrajudicial statements in the absence of proof a crime had been committed is separate from the issue of whether the prosecution was timely under section 803(g) (which required a jury finding that there was independent evidence clearly and convincingly corroborating Ryan's allegations). None of the cases cited by Renderos abrogates the statement in *People v. McGill* (1935) 10 Cal.App.2d 155, 159, that "the facts which prove the existence of the corpus delicti are entirely distinct and separate from those by which the liability of the defendant to be prosecuted for the commission of the crime are sought to be established; and that, although the right to maintain the action is an essential element in the final power to pronounce judgment, that element constitutes no part of the crime itself." (See, also, *People v. Crosby* (1962) 58 Cal.2d 713, 723-724, citing to *People v. McGill, supra*, 10 Cal.App.2d at p. 159; *People v. Chadd* (1981) 28 Cal.3d 739, 758 (*Chadd*), citing to *People v. Crosby*, 58 Cal.2d at p. 723.) The trial court here instructed the jury that as to each offense of which they had found Renderos guilty, they then had to determine whether the prosecution of the offense had been timely commenced, which included finding there was clear and convincing independent evidence corroborating Ryan's allegations. Consequently, "[b]efore reaching the issue of

[the statute of limitations], . . . the jury . . . not only determine[] that a crime ha[d] occurred, but that [Renderos was] the perpetrator. The danger of a conviction when there was no crime cannot arise in this context." (*People v. Hamilton, supra*, 48 Cal.3d at p. 1176.)

There is no merit to Renderos's further argument the Legislature's use of the words "independent evidence" in section 803(g) means that language has the same meaning as used in the "corpus delicti rule," in that there had to be some evidence of corroboration of Ryan's allegations apart from Renderos's extrajudicial statements. The words "independent evidence" do not have any special meaning. Rather, any reference to "independent evidence" in section 803(g) must be read in context. In requiring independent evidence corroborating the victim's allegations, the Legislature meant evidence in addition to the victim's allegations. That in this case the corroborating evidence happened to be Renderos's extrajudicial statements does not impose an additional evidentiary requirement. The Legislature placed only two limitations on the corroborating evidence: "No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals." Here, without defense objection, the trial court properly admitted Renderos's extrajudicial statements. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1172.) Whether those statements would be sufficient to *convict* Renderos absent proof of a crime does not render the statements "otherwise inadmissible during trial." In determining whether Renderos's extrajudicial statements corroborated Ryan's testimony, the jury was merely required to determine whether Renderos made the statements, and if so, whether such evidence "clearly and convincingly" proved Ryan was telling the truth. Renderos's extrajudicial statements did not have to be otherwise independently proved for the purpose of corroborating Ryan's allegations.

We also reject Renderos's contention his telephone statements were used by the jury as propensity evidence for some of the offenses of which Renderos was convicted. He contends that because he made no references during the telephone conversations to sodomy, digital penetration, or specific instances of masturbation, and did not corroborate

the time period of the abuse, the jury must have used the telephone statements as propensity evidence, finding that because some of the offenses were specifically corroborated by his telephone statements, that was sufficient to corroborate all the charged offenses. However, section 803(g) does not set forth any minimal criteria in terms of quality or quantity of evidence which is required to meet the clear and convincing standard of corroborative evidence of the victim's allegations. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 403.) In recent appellate decisions, the courts have ruled a victim's allegations against the defendant can be corroborated solely by evidence of similar sex offenses committed against other victims. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 659 ["[n]othing in section 803, subdivision (g), precludes the People from proving the corroboration requirement solely with evidence of a similar offense committed against an uncharged victim"]; *People v. Yovanov, supra*, 69 Cal.App.4th at p. 404 [evidence defendant committed uncharged sexual misconduct against another victim can be used to corroborate victim's allegation of sexual abuse under section 803(g)].) "[T]he precise probative value to be accorded to [the corroborative evidence of similar sexual misconduct] will depend on various considerations, such as the frequency of the [other] acts and their similarity and temporal proximity to the charged acts." [Citation.]" (*People v. Yovanov, supra*, 69 Cal.App.4th at p. 404.) In this case, Renderos's telephone statements, standing alone, were sufficient corroboration to support the true findings on the section 803(g) allegations. The jury could reasonably find all the sexual offenses were so significantly similar in nature to each other and occurred in such close temporal proximity to each other that Renderos's telephone statements (consisting of either admissions or adoptive admissions of some acts of lewdness, masturbation, and oral copulation) clearly and convincingly corroborated Ryan's testimony regarding all the acts of abuse.

C. Instructions on Statute of Limitations

Renderos raises a number of objections to the trial court's jury instructions concerning section 803(g), claiming the errors deprived him of due process. None of the contentions warrants reversal.

The trial court initially instructed the jury it should first consider whether Renderos was guilty of each offense by proof showing beyond a reasonable doubt he committed the designated elements of the offenses. The court then instructed the jury on the statute of limitations using the following special instruction provided by the People: "Counts One through Twenty-seven were filed pursuant to Penal Code Section 803(g), which extends the normally applicable statute of limitations under specific circumstances. [¶] The People have the burden of proving the following factual allegations in order for Penal Code section 803(g) to apply. [¶] If you find that the defendant is guilty beyond a reasonable doubt of any of the counts filed pursuant to Penal Code section 803(g) you must further determine as to each count in which you find guilt whether the People have proved the following factual allegations: [¶] 1. On March 19, 2001, the victim reported to a California law enforcement agency that he, while under the age of 18, was a victim of [enumerated sexual offenses]. [¶] 2. A complaint accusing the defendant of the crimes was filed on April 25, 2001. [¶] 3. The crimes involved substantial sexual conduct . . . . [¶] 4. The normally applicable six year statute of limitations for the crimes alleged in Counts 1-27 . . . expired before the complaint in this case was filed. [¶] 5. There is independent evidence that clearly and convincingly corroborates the victim's allegation, not including the opinion of a mental health professional. Clear and convincing evidence of the corroboration means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. You should consider all of the evidence bearing upon every issue regardless of who produced it. Corroborating evidence is evidence which tends to connect the defendant with the commission of the crime. [¶] The People have the burden of proving the truth of the Penal Code section 803 subdivision (g) allegations

by a preponderance of the evidence. [¶] . . . [¶] If you find the People have not proved the truth of the Penal Code section 803 subdivision (g) allegations by a preponderance of the evidence, you must find the allegations not true. [¶]There is a special finding on the section 803, subdivision (g) allegations included on the verdict form(s) as to Counts 1-27."

Renderos initially argues the trial court erred by instructing the jury it should determine whether he was guilty of the charged offenses before determining whether the prosecution was timely.[8] We disagree. The trial court's instruction directed the jury to make specific factual findings on the issues of Renderos's commission of the enumerated elements of the offenses and the statute of limitations, rather than return a general verdict of "guilty or not guilty" on all issues. The special instruction was consistent with the Supreme Court's admonition in *People v. Zamora* (1976) 18 Cal.3d 538, 565, footnote 27, that because the People bear the burden of proving the prosecution is timely by a preponderance of the evidence, "when a limitation issue goes to the jury the preferable practice should be to carefully instruct the jury as to that burden making it clear the lesser burden applies *solely* to the limitation issue. (See *People v. McGill, supra,* 10 Cal.App.2d 155, 159-160.)"

Contrary to Renderos's further contention, the special instruction did not contradict the established procedure set forth in the standard CALJIC instructions on the statute of limitations. Renderos cites to CALJIC Nos. 4.70 and 4.73 in support of his argument the trial court was required to instruct the jury they had to find the prosecution timely in order to find the defendant guilty. However, CALJIC No. 4.70 concerns the situation where the timeliness of the prosecution is governed by the date the crime was committed, and CALJIC No. 4.73 concerns the situation where a defendant is absent from the state following the commission of a crime and the instruction makes no

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8 Although Renderos did not object at trial to the instruction on this basis, because his "claim . . . is that the instruction is *not* 'correct in law,' and that it violated his right to due process of law[,] the claim . . . is not of the type that must be preserved by objection. [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7; italics in original.)

reference to the standard by which the People must prove the defendant was absent from the state. Unlike the situations covered by CALJIC Nos. 4.70 and 4.73, the determination that was required to be made by the jury in this case is most like the one a jury must make in the statute of limitations situation where the discovery rule applies. When the latter situation applies, CALJIC No. 4.74 provides that the court is to instruct the jury it may convict the defendant only if the crime was discovered within a specified number of years of the commencement of the prosecution. The instruction concludes with the following sentence: "*Even though the People must prove that the defendant is guilty beyond a reasonable doubt, the People must only prove by a preponderance of the evidence that the [crime] was discovered . . . within [a certain number of] years of the commencement of the action*." (CALJIC No. 4.74; italics added.) Similarly, in this case, the trial court's special instruction, which separated the jury findings on the elements of the offenses from the jury findings on the statute of limitations issue, allowed the jury to consider the issue of Renderos's commission of the offenses that had to be established by proof beyond a reasonable doubt without confusing their findings based upon the lesser burden of proof relating to the timeliness of the prosecution. At no time was the jury instructed their findings as to the elements of the offenses were determinative of their findings regarding the statute of limitations allegations. The special instruction merely told the jury how to apply the People's different burdens of proof. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016 [recognizing jurors are often asked to apply different standards of proof to findings in a criminal trial, citing to CALJIC No. 4.74].)

Renderos additionally argues the trial court improperly instructed the jury that the People's burden of proof on the factual allegations under section 803(g) was by a preponderance of the evidence, and not the higher burden of proof beyond a reasonable doubt.[9] Renderos's argument is based upon the premise that because a defendant may not be convicted of an offense that is time-barred, the statute of limitations is an "element of the offense" that needs to be proved beyond a reasonable doubt. Concededly, the

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9 See footnote 8, ante.

courts have described the statute of limitations as part of the People's case to plead and prove as any other "element" of the offense. (See, e.g., *People v. Le* (2000) 82 Cal.App.4th 1352, 1360.) However, our Supreme Court has consistently held the prosecution is required to prove any factual allegations regarding the statute of limitations only by a preponderance of the evidence in the absence of any other standard set by the Legislature. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016; *People v. Frazer, supra*, 21 Cal.4th at pp. 760-761, fn. 22; *People v. Zamora*, *supra*, 18 Cal.3d at p. 565, fn. 27.)

We reject Renderos's contention that prevailing federal constitutional law concerning the burden of proof in criminal cases requires us to now declare the factual allegations concerning the statute of limitations should be deemed an element of the offense that must be established beyond a reasonable doubt. "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (*Patterson v. New York* (1977) 432 U.S. 197, 210.) In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 490, the United States Supreme Court also held the federal constitution requires the prosecution to prove beyond a reasonable doubt any fact, other than a prior conviction, that increases the maximum punishment for the offense. However, no United States Supreme Court or lower federal court case holds, as a matter of federal constitutional law, that the timeliness of a criminal prosecution must be proved beyond a reasonable doubt. Renderos's reliance on *Grunewald v. United States* (1957) 353 U.S. 391, 398 *(Grunewald)*, and its progeny is misplaced. As conceded by Renderos, *Grunewald* does not expressly state the statute of limitations applicable for the crime of conspiracy needs to be proved beyond a reasonable doubt. Further, the *Grunewald* court was not concerned with the trial court's instruction to the jury regarding the standard of proof by which the People had to establish the timeliness of the prosecution. To the extent the trial court in *Grunewald* instructed the jury the defendant could not be found guilty unless the jury found beyond a reasonable doubt both an agreement and one overt act within the applicable statute of limitations, it is only because the commission of the overt act coincided with the completion of the crime of conspiracy, which started the time running

to prosecute the case, that such an instruction was proper. Here, however, the offenses were completed during the time period of May 1992 through mid-September 1994, but the time within which to commence the prosecution was extended by operation of section 803(g). Therefore, the timeliness of the prosecution is not governed by the completion of "elements of the offense," as in a conspiracy prosecution, but rather by acts subsequent to the commission of the offenses, namely, the filing of an accusatory pleading within one year of the victim's report to a law enforcement agency.

Finally, there is no merit to Renderos's contention the trial court erred in instructing the jury on the definition of "clear and convincing evidence." The trial court defined "clear and convincing evidence" using the language in BAJI No. 2.62. Renderos argues the trial court should have instructed the jury, as he had requested, using the following language: " ' "The phrase 'clear and convincing evidence' has been defined as 'clear, explicit, and unequivocal,' 'so clear as to leave no substantial doubt,' and 'sufficiently strong to demand the unhesitating assent of every reasonable mind.' " [Citation.]' [Citation.]" (*People v. Martin* (1970) 2 Cal.3d 822, 833, fn. 14, quoting from *People v. Caruso* (1968) 68 Cal.2d, 183, 190, disapproved on other grounds in *People v. Chojnacky* (1973) 8 Cal.3d 759, 764.) However, the trial court was not required to use the language requested by Renderos. (*People v Mabini, supra,* 92 Cal.App.4th at p. 661.) "The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence." (*Id*. at pp. 655-656.) The language in BAJI No. 2.62 was a correct statement of the law. (*In re Angelia P.* (1981) 28 Cal.3d 908, 919; see *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [citing with apparent approval *In re Angelia P., supra,* 28 Cal.3d at page 919 and BAJI No. 2.62].) Consequently, because no additional language was required regarding the

definition of "clear and convincing evidence," the trial court's refusal to expand the definition does not constitute error.[10]

II. Continuous Sex Abuse Conviction

Renderos was convicted of violating section 288.5, which provides, in relevant part: "(a) Any person who . . . has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . or three or more acts of lewd or lascivious conduct . . . with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child. . . . [¶] (b) To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number."

He now argues the People failed to prove three acts of substantial sexual conduct or lewd conduct occurred within the four-month period from May 1, 1992 through September 18, 1993, when Ryan was eight years old, as charged in count 1 of the second amended information. We disagree.

In viewing the evidence in a light most favorable to upholding the verdict, as we must, the jury could have reasonably found based upon Ryan's testimony that more than three incidents of sexual abuse took place when he was eight years old during the four month period covered by count 1. The necessary three acts occurred during the first and second incidents when Ryan was eight years old. (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6 (*Scott*) ["multiple sex acts committed on a single occasion can result in multiple statutory violations"].) Relying upon the reasoning in *People v. Bevan* (1989)

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10 We note the language used by the trial court in defining clear and convincing evidence is consistent with CACI 201 (1st ed. 2003), the recently approved civil jury instruction, which directs the trial court to instruct the jury that in making its finding a party has met his or her burden of proof by clear and convincing evidence, "the party must persuade [the jury] that it is highly probable that the fact is true." (See Sources and Authority note for CACI No. 201 (1st ed. 2003), citing to *In re Angelia P., supra*, 28 Cal.3d at p. 919.)

208 Cal.App.3d 393, 399-403 (*Bevan*) and *People v. Bothuel* (1988) 205 Cal.App.3d 581, 589-592 (*Bothuel*), Renderos argues the two acts that occurred during the second incident (Renderos touching Ryan's penis and then forcing Ryan to masturbate him) constitute only one act. However, the Supreme Court in *Scott* specifically found the reasoning in *Bevan* and *Bothuel* to be "flawed." (*Scott, supra*, 9 Cal.4th at p. 347.) "*Bevan* and *Bothuel* do not properly analyze the circumstances under which a defendant may be separately convicted . . . for separate lewd acts committed in a single encounter. They are disapproved to this extent." (*Id*. at pp. 347-348.) In any event, the jury could have found a third incident occurred before Ryan turned nine based upon his testimony the sexual abuse continued on a more frequent basis as he got closer to nine, with the third incident happening "a little bit after" the second incident, and then on an almost nightly basis, "at least once every three days." Ryan additionally testified from the time the sexual activity started (when he was eight) until the time it ended, it occurred each month during that period of time; and once the molestation started, there were never any months when Renderos did not molest him. In support of his argument a third incident did not occur when Ryan was still eight, Renderos cites to isolated portions of Ryan's testimony: Ryan's testimony he could not recall how many times the molestation happened while he was still eight years old, and when Ryan was asked, "But you say it was like nearly every night that your mom left?", he replied: "That got more into when I was about nine years old." However, as noted, the testimony relied upon by Renderos is not the extent of Ryan's testimony regarding the third incident or the continuous nature of the abuse he suffered shortly after the second incident, from which the jury could reasonably conclude three acts of substantial sex abuse took place over the four months in question.

III. Oral Copulation Conviction

Renderos was found guilty of committing the crime of unlawful oral copulation in violation of section 288a, subdivision (c) (section 288a(c)), by participating in an act of oral copulation (between September 19, 1992 and September 18, 1994) when he was 10 years older than Ryan, who was then under the age of 14 years. At the time of the

commission of the offense, former section 288a(c) read: "Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she, *or* when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person *or* where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat shall be punished by imprisonment in the state prison for three, six, or eight years." (Italics added.)

Renderos argues his conviction for oral copulation is barred under the ex post facto clauses of the state and federal constitutions. His contention is based upon the assumption that under the law as it existed at the time of the commission of the offense, former section 288a(c) required the People to plead and prove not only the age difference between the defendant and victim but also such offense was committed by force and violence. Consequently, he argues that because the current section 288a(c), as charged under count four of the second amended information, eliminates the force and violence elements of its predecessor, it lessened the amount of evidence needed to convict him of that offense, thereby contravening ex post facto principles. We disagree.

Renderos's contentions are based upon an incorrect premise. Under both the predecessor and current versions of section 288a(c), the People can prosecute a charge of oral copulation based solely upon the age difference between the victim and the defendant. In the former statute, the use of the disjunctive "or" between the various means by which a defendant could commit the criminal offense of oral copulation permitted a conviction based solely on the age difference between the defendant and the victim, like the current statute. As noted by the People, in 1998, subdivision (c) of section 288a was rewritten merely to clarify the various means of committing criminal oral copulation by separating each theory into its own paragraph; there was no intent to

change the substantive nature of the offense.[11] (Stats. 1998, c. 936, § 25 ["The amendment[] to section 288a . . . which number certain subdivisions with paragraphs, [is] intended to be [a] technical amendment[ ] only and [is] not intended to make any substantive changes in th[at] section[]"].) Thus, there is no merit to Renderos's claim his conviction for oral copulation was barred by any change in the law ex post facto.

IV. Admission of Other Crimes Evidence

Renderos challenges the admission into evidence of a portion of the tape of the telephone calls between himself and Ryan, which is transcribed on page 13 of the tape's transcript, and is set out in the margin of this opinion.[12] In this part of the conversation,

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11 Section 288a(c) currently reads: "(c)(1) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] (2) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] (3) Any person who commits an act of oral copulation where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years."

12 The relevant part of the transcript reads as follows:

"A. [Renderos]: Hey, do you know any -- any ho's Man? Fix me up.
Q. [Ryan]: No, I don't know no ho's.
A. Fix me up, Man.
Q. I'll see what I can do.
A. Fix me up.
Q. I'll see what I can do.
A. Something nice and about 18, you know?
Q. Yeah.
A. I can, you know, legal.
Q. You don't want 'em younger, maybe?
A. Well, I don't know. Am I -- Oh, you know? Never know.
Q. All right. . . .
A. See what you can do, Man.
Q. All right.
A. You know I like my pussy, Bubba.
Q. All right.
A. Whenever you want to talk. Whenever you have problems, call me, Man. Call me."

Renderos asked Ryan to "fix him up" with a "ho" (slang for prostitute) age 18 or younger. Overruling defense counsel's objections that the evidence was irrelevant and highly prejudicial, the trial court stated: "[I]n reading so far the areas of objection, especially page thirteen, I think it goes far to describe the relationship between the alleged victim and the defendant. And I think that is relevant to the charges."

Renderos now argues he was deprived of due process by the admission of the challenged evidence because its only relevance was to show his propensity to commit crimes (solicitation of prostitution and statutory rape) with underage persons and in the absence of an instruction not to consider the evidence as tending to prove propensity, the jury might well have mistaken this evidence as "corroboration" of the charged offenses. Initially, we note that in seeking to exclude this portion of the transcript, appellant did not raise any "propensity" argument nor did he request the trial court to caution the jury on the use of the evidence. (See *People v. Bolin* (1998) 18 Cal.4th 297, 327-328 [trial court has no sua sponte duty to instruct the jury as to use of other crimes evidence].) In any event, we need not address whether the trial court should have allowed into evidence the challenged part of the tape. Assuming for the sake of argument the trial court should have excluded the challenged evidence, the error was harmless beyond a reasonable doubt. The prejudicial effect of the evidence was minimal given that it "was no stronger and no more inflammatory than the [evidence] concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) It is unlikely "the jury might [have] doubted that [Renderos] committed the charged offenses but convict[ed] anyway because of a belief he committed [any] uncharged crimes. [Citation.]" (*Carpenter, supra,* 15 Cal.4th at p. 380.) Accordingly, reversal on this basis is not warranted.

V. Prosecutorial Misconduct

Renderos argues on appeal his conviction should be reversed because the trial prosecutor failed to prevent Ryan's mother, Lisa, from testifying on cross-examination

both her sons had been molested,[13] and the prosecutor did not disavow Lisa's testimony (which had been stricken), but instead referred to it during her closing statement to the jury, when she argued: "I think what you saw from [Lisa] was some really righteous emotion on the witness stand. She was upset . . . .[¶] What she said, you know, was emotional. I don't think you can read that to say she was somehow making these things up to help the case along . . . . [¶] When we are talking about, you know, credibility, you can look at the witness's demeanor while they are testifying. You can look at Lisa . . . , what she did, what she said, her emotions." There is no merit to Renderos's contentions regarding the prosecutor's conduct.

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13 The transcript of Lisa's testimony during cross-examination, in context, with the challenged portion italicized, reads as follows:

"Q. . . . [W]hat kind of relationship did you have with your son, Ryan?

"A. What kind of relationship did I have with my son, Ryan?

"Q. During the time period '92 to '96?

"A. Ryan had some signs of dysfunction. There was no doubt. He had some anger issues. I took Ryan to psychologists. I took him to psychiatrists. Um, from the period of six grade to the present he's been in about eight different schools. I have met with special education. . . . I didn't know what the problem was with Ryan . . . . [¶] He's never been in trouble outside of our home. Everything has always been centered from our home. He would get angry, punch a door, hit the wall, things like this. I didn't know why.

"Q. You are saying this all occurred approximately around 1992?

"A. No, it started a little later . . . . [¶] It started later.

"Q. It's fair to say this type of behavior was never present in Ryan before?

"A. No.

"Q. 1992?

"A. No, both of my boys, and I say both of my boys have had problems, both my boys have been molested.

[Defense Counsel]: Objection, move to strike, your Honor.

The Court: Sustained

[Defense Counsel]: Nonresponsive.

The Court: The jury will disregard the last sentence, please.

[Lisa]: Don't shake your head like that. Don't do it.

The Court: Ms. C[ ], there is no question before you, please."

The transcript does not indicate to whom Lisa is directing her remark regarding the shaking of a head. Renderos claims Lisa was "possibly directing her remark to [him]" and the People "recognize" the remark was likely directed at Renderos.

The record does not contain any evidence the prosecutor knew or should have known Lisa was going to mention both her sons had been molested. Moreover, the trial court directed the jury to disregard the testimony, and we assume the jury followed that instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Further, Renderos did not object or request any cautionary instruction regarding either Lisa's conduct or the prosecutor's references to the emotional nature of Lisa's conduct on the witness stand. In any event, to the extent any of the challenged comments were erroneous or inappropriate, it is not reasonably probable a different result would have been reached in the absence of those remarks. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

VI. Instruction on Circumstantial Evidence

Without objection, the trial court instructed the jury on the meaning of circumstantial and direct evidence, and the meaning of "inference," as follows: "Evidence is either direct or circumstantial. [¶] Direct evidence is evidence that directly proves a fact. It is evidence which by itself if found to be true establishes the fact. [¶] Circumstantial evidence is evidence that if found to be true proves a fact from which an inference of the existence of another fact may be drawn. [¶] An 'inference' is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [¶] Direct evidence often times is considered eye witness evidence. Somebody that has seen an act and describes it in court. [¶] Circumstantial evidence, I'll give you an example. *Let's assume this is a case where a person is accused of breaking into a jewelry store. And the facts are that somebody broke the glass in the jewelry store in front of the store, grabbed some jewelry and ran. No one saw those acts, but a person is caught within a block or two of the store, and in the cuffs of the pants of the individual, they find broken glass that matches the glass that was broken from the front of the store. Also that he's in possession of jewelry that is identified from being taken from that store. The fact there is glass in the cuffs of the individual, and the fact that he was in possession of jewelry is circumstantial evidence tending to prove guilt.* That's kind of an example of what direct and circumstantial

evidence is. [¶] It is not necessary the facts be proved by direct evidence. They may be proved also by circumstantial evidence or a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other."

Renderos now challenges the italicized language of trial court's instruction, arguing that "this one-sided example suggested to the jury that circumstantial evidence is always highly probative of guilt, giving a false significance to such evidence." He further argues that although the prosecution's evidence in support of the charges was primarily Ryan's direct testimony he had been sexually abused, the "corroborating" evidence required under section 803(g) was almost entirely circumstantial, consisting of Renderos's telephone statements. Accordingly, Renderos argues even if the court had not given the challenged example, the court should have instructed sua sponte using the language in CALJIC No. 2.01, which, in pertinent part, informs the jury circumstantial evidence is no more probative than any other evidence and should be evaluated carefully. Renderos concludes by arguing: "Having given the argumentative example, it was incumbent upon the trial court to correct any false impression the jury might have gotten by giving CALJIC No. 2.01."

Initially, we note Renderos waived his right to appellate review of the jury instructions on the issue of circumstantial evidence by failing to object to the instruction or requesting clarification of the instruction at the trial level. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) In any event, he has failed to show how the instruction affected his fundamental rights. The correctness of jury instructions is determined from the entire instructions given by the court and not from isolated parts of the instructions. (*People v. Smithey, supra,* 20 Cal.4th at p. 964.) The example of circumstantial evidence did not suggest to the jury that "circumstantial evidence is always highly probative of guilt," as argued by Renderos. Consequently, the trial court was not required to correct any misimpression by instructing the jury using the language in CALJIC No. 2.01. The trial court was not otherwise under any duty to instruct the jury using the language in CALJIC No. 2.01 on its own initiative. (See *People v. Wiley* (1976) 18 Cal.3d 162, 174

[defendant's "[e]xtrajudicial admissions, although hearsay, are not the type of indirect evidence as to which the instructions on circumstantial evidence [under CALJIC No. 2.01] are applicable"]; *People v. Williams* (1984) 162 Cal.App.3d 869, 874-876 [CALJIC No. 2.01 need not be given sua sponte when the circumstantial evidence merely corroborates other evidence].)

VII. Instruction on Renderos's Statements

Without objection, the trial court instructed the jury on its consideration of Renderos's statements using only the first two sentences in CALJIC No. 2.71, as follows: "An admission is a statement made by [a][the] defendant which does not by itself acknowledge [his][her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the result of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part." The court did not use the third sentence of CALJIC No. 2.71, which would have instructed the jury that "[e]vidence of an oral admission of [a][the] defendant not made in court should be viewed with caution" (cautionary instruction).[14]

Renderos now argues the trial court committed prejudicial error by failing to give the cautionary instruction sua sponte. He concedes the trial court was not required to instruct the jury to view with caution his telephone statements, which were recorded by the police. (*People v. Mayfield* (1997) 14 Cal.4th 668, 776.) However, he contends the cautionary instruction was required regarding Ryan's testimony as to the following statements: (1) (during the Russian River incident) Renderos told Ryan to leave his (Ryan's) hand on Renderos's penis; (2) (during a discussion between Ryan and Renderos prompted by Ryan asking Renderos if he had ever been in jail) Renderos stated, "there are consequences for everything"; and (3) (months after the Russian River incident)

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14 Because the trial court only instructed the jury using the language in CALJIC No. 2.71, we assume Renderos's citation to CALJIC No. 2.70 is a typographical error and his argument is directed to the use of CALJIC No. 2.71.

Renderos told Ryan not to talk about their sexual encounters; Renderos said he (Renderos) would get in trouble, and Ryan should not discuss the matter with his mother.

Our Supreme Court has held that regardless of whether a defendant's out of court statement is technically an "admission" under traditional rules of evidence, the trial court has a sua sponte duty to give the cautionary instruction after admitting into evidence "any oral statement of the defendant, whether made before, during, or after the crime." (*Carpenter, supra,* 15 Cal.4th at p. 393.)[15] However, even though the cautionary instruction should have been given here, reversal is not warranted.

"We apply the normal standard of review for state law error; whether it is reasonably probable the jury would have reached a result more favorable to [Renderos] had the instruction been given. [Citations.]" (*Carpenter, supra,* 15 Cal.4th at p. 393.) Citing to *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, Renderos argues that where a violation of state law also violates federal due process, the more stringent standard for federal constitutional error is mandated. "He is wrong. Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [ ].) Failure to give the cautionary instruction is not one of the ' "very narrow[]" ' categories of error that make the trial fundamentally unfair. (*Id*. at p. 73 [ ].)" (*Carpenter, supra*, 15 Cal.4th at p. 393.) "Omission of [CALJIC No. 2.71] does not constitute reversible error in every

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15 The People's argument that a cautionary instruction was not warranted because the challenged statements here were either part of the crime itself or facilitated the crimes confuses the requirement of instructing the jury to view evidence of a defendant's out of court statements "with caution" (cautionary instruction) with the requirement of instructing the jury the corpus delicti of a crime must be proved independently of a defendant's admission or confession (the corpus delicti instruction). The *Carpenter* court expressly distinguished the trial court's need to give the cautionary instruction (ruling such an instruction is to be given regarding "any oral statement of the defendant, whether made before, during, or after the crime" (15 Cal.4th at p. 393)) from the corpus delicit instruction (ruling such an instruction only applied to preoffense statements of later intent and postoffense statements, but it "d[id] not apply to a statement that is part of the crime itself"). (*Id*. at p. 394.) Thus, while Ryan's testimony regarding Renderos's out of court oral statements did not have to be independently proved, the trial court should have instructed the jury to view Ryan's testimony regarding those statements with caution.

instance. Reversal is justified only if upon a reweighing of the evidence it appears reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. [Citation.] The circumstances of each case must be examined to determine whether a failure to give cautionary instructions constitutes reversible error. [Citation.]" (*People v. Lopez* (1975) 47 Cal.App.3d 8, 13.)

As noted, defendant did not object to the trial court's failure to instruct the jury it should view Renderos's out of court admissions with caution. "This circumstance does not obviate the court's sua sponte duty, but may be considered in determining prejudice." (*Carpenter, supra*, 15 Cal.4th at p. 393.) "Moreover, the court fully instructed the jury on judging the credibility of a witness, thus providing guidance on how to determine whether to credit [Ryan's] testimony." (*Ibid*.) Finally, this case is factually distinguishable from the circumstances in *People v. Deloney* (1953) 41 Cal.2d 832, 840 (*Deloney*) and *People v. Ford* (1964) 60 Cal.2d 772, 799 (*Ford*), cited by Renderos. In those cases, the defendants' statements subject to the cautionary instruction "constituted a substantial part of evidence offered to establish the prosecution's case." (*Ford, supra*, 60 Cal.2d at pp. 799-800; see *Deloney, supra*, 41 Cal.2d at p. 840.) Here, the statements at issue were not vitally important evidence. Given the nature of Renderos's telephone statements, which were not subject to the cautionary instruction, we cannot say the verdict would have been different had the jury been told to view with caution Renderos's other extrajudicial statements. (*People v. Watson, supra,* 46 Cal.2d at p. 835.)

VIII. Sentencing Errors

The trial court sentenced Renderos to the aggravated base term of 16 years in prison for his conviction for continuous sexual abuse, and imposed consecutive sentences of two years (one-third the middle term) for each of the remaining 25 convictions, for a total term of 66 years.

Renderos argues he is entitled to be resentenced before a different judge because the court supported its sentencing choices by using elements of the crimes as aggravating factors, by relying upon factors not supported by the trial evidence, and the court did not

consider obvious mitigating factors. However, having failed to object to the court's statements at the time of sentencing, Renderos waived any challenge to his sentence on these grounds. (*Scott, supra,* 9 Cal.4th at pp. 353-356.) In any event, a new sentencing hearing is not mandated. In its discretion, the trial court may rely upon one single valid aggravating factor and reject all mitigating factors. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1758.) Here, in imposing the "high term of sixteen years in state prison" on the conviction for continuous sexual abuse under section 288.5, the trial court relied upon the valid aggravating circumstance that Renderos had taken "advantage of a position of trust" that enabled him to commit the sex offenses against Ryan. (See Cal. Rules of Court, rules 4.421(a)(11); *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263 ["breach of position of trust" is not an element of continuous sexual abuse under section 288.5, and therefore it is properly considered an aggravating factor]; *People v. Clark* (1992) 12 Cal.App.4th 663, 666 [same].) In imposing consecutive terms, the court relied upon the additional valid factors that each crime was predominantly independent of each other and the crimes were committed at separate times, "occurr[ing] over a two-and a half year period," rather than being committed so closely in time as to indicate a single period of aberrant behavior. (See Cal. Rules of Court, rule 4.425(a)(1), (3).) Because valid criteria justified the trial court's sentencing decisions, we are reasonably certain any other comments or factors relied upon by the court were not determinative of its decision.[16] Were we to remand the matter, the trial court would merely omit any reference to the challenged comments or factors, and would properly reach the same result. (See *People v. Osband, supra,* 13 Cal.4th at pp. 728-729.)

IX. Habeas Corpus Petition

"A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove,

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16 Consequently, we need not address Renderos's contention the trial court improperly stated at one point during its comments there were no mitigating circumstances.

by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]" (*In re Visciotti* (1996) 14 Cal.4th 325, 351.) If the petitioner does not state a prima facie case for relief, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an order to show cause. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) The facts alleged by Renderos regarding his trial counsel's conduct do not, in our view, establish a prima facie case for relief.

A. Trial Counsel's Failure to Challenge The Accusatory Pleadings

The prosecutor filed a complaint on April 25, 2001, charging Renderos, in relevant part, with committing 27 felony sex offenses between May 1, 1992 and September 19, 1994. On its face, the complaint was insufficient because it did not contain factual allegations under section 803(g) that an extension to the six-year statute of limitations under section 800 applied to the offenses. Renderos waived his right to a preliminary examination, and the court deemed the complaint to be the information. The People filed an amended information that included the factual allegations under section 803(g). They later moved to file a second amended information, the operative pleading, which again included the factual allegations under section 803(g). Renderos opposed the filing of the second amended information, arguing the section 803(g) allegations should be stricken on the sole ground there was no evidence that clearly and convincingly corroborated Ryan's allegations. Before trial, the trial court granted the People's request to file the second amended information. The court rejected Renderos's contention his telephone statements were too ambiguous to constitute clear and convincing evidence corroborating Ryan 's allegations.

In his petition for habeas corpus, Renderos argues his trial counsel was ineffective because he failed to move to dismiss the information or challenge any amendment to the information on the ground the complaint did not initially include factual allegations under section 803(g). However, his claim of ineffective assistance is premised on the incorrect assumption that because the complaint did not contain any factual allegations under

section 803(g), and there was no preliminary hearing at which evidence regarding those allegations was presented, the People could not later add the factual allegations under section 803(g) to any information.

Section 1009 governs the amendment of criminal pleadings. In relevant part, it currently provides: "The court in which an action is pending may order or permit an amendment of an indictment . . . or information . . . for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. . . . *An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination*." (*Ibid.*; italics added.)[17] Here, the defendant waived his right to a preliminary examination. Thus, the issue is whether the adding of factual allegations under section 803(g) bringing the prosecution within the statute of limitations can be viewed as charging different offenses than those alleged in the original felony complaint (that was deemed the information).

Although neither Renderos nor the People cite to it, *Chadd*, *supra*, 28 Cal.3d 739, is dispositive of Renderos's contention that the People cannot amend an information to add factual allegations under section 803(g) where there has been no preliminary hearing. In *Chadd*, the People filed a complaint charging the defendant with various offenses. (*Id*. at p. 744.) The defendant waived a preliminary examination and was later arraigned on an information filed on January 25, 1979, alleging, in relevant part, that four and one-half years earlier, on or about July 26, 1974, the defendant had committed a rape, sodomy, burglary and robbery. (*Id*. at pp. 744, fn. 1, 756.) After the defendant pleaded guilty and was sentenced, he appealed on the ground his convictions for the noted felonies were barred by the applicable three-year statute of limitations. (*Id.* at p. 756.) The Supreme

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17 Section 1009 was amended in 1998 to accommodate unification of the municipal and superior courts in a county and to make the language gender neutral throughout the section. (Stats. 1998, ch. 931, § 393, eff. Sept. 28, 1998.) The statute was not otherwise changed.

Court agreed with the defendant that because there were no factual allegations in the information to take the matter within the statute of limitations, his convictions had to be reversed. (*Id*. at pp. 756-757.) However, the Court specifically rejected the "defendant's further contention that on remand these counts cannot be amended to allege facts tolling the statute (see Pen. Code, § 802)." (*Id.* at p. 758.) The court stated: "Our reversal of the judgment on these counts, of course, 'remands the cause for new trial and places the parties in the trial court in the same position as if the cause had never been tried.' [Citation.] After entry of plea, an accusatory pleading may be amended with leave of court 'for any defect or insufficiency, at any stage of the proceedings' - including, therefore, on remand after reversal - provided the amendment does not 'change the offense charged' or otherwise prejudice the substantial rights of the defendant. (§ 1009.) An amendment adding allegations tolling the statute of limitations does not 'change the offense charged' (*People v. Crosby* (1962) . . . 58 Cal.2d 713, 723); and there is neither claim nor showing that such amendment would prejudice the substantial rights of this defendant, who has been aware of the charges at all times and indeed testified at length to the factual basis of each in pleading guilty thereto. It follows that on remand the prosecution will be entitled to seek leave to amend the information by adding appropriate allegations tolling the statute. [Citations.]" (*Chadd, supra*, 28 Cal.3d at p. 758.) So, too, in this case, the People were authorized to seek leave to amend the information by adding appropriate factual allegations bringing the prosecution within the statute of limitations under section 803(g).

Renderos's reliance on *People v. Winters* (1990) 221 Cal.App.3d 997 (*Winters*), is misplaced. In that case, the defendant waived a preliminary hearing on the felony complaint and was later charged by an information with possession of methamphetamine for sale, the only offense in the complaint. During the trial, the prosecutor moved to amend the information by adding an additional charge of transportation of methamphetamine. (*Ibid.*) Over the defendant's objection, the trial court granted the motion and the jury convicted the defendant of both counts. The Fifth District Court of Appeal held the defendant's conviction for transportation of drugs had to be dismissed

because "[s]ection 1009 specifically proscribes amending an information to charge an offense not shown by the evidence taken at the preliminary hearing." (*Id*. at p. 1007.) In this case, however, the People did not seek to add new offenses to those alleged in the felony complaint; the offenses in both the original information and the second amended information were exactly the same as those in the felony complaint. As noted, the added factual allegations under section 803(g) did not change the offenses charged. (*Chadd, supra*, 28 Cal.3d at p. 758.)

Thus, even if Renderos's trial counsel had objected to the information or any amendment to the information on the basis the prosecutor could not add factual allegations under section 803(g), such a challenge would have be futile. Under section 1009, the trial court was authorized to grant the prosecutor's request to amend the information by including those allegations. (*Chadd, supra*, 28 Cal.3d at p. 758.) Renderos has not shown the addition of the factual allegations under section 803(g) prejudiced his substantial rights. (See § 960 ["[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits"].) At all times, Renderos was aware of the time periods during which the offenses happened, and he testified at length without alleging he was unable to mount a proper defense. Even if the trial court erred in allowing the amendment, when the statute of limitations issue is tried to a jury, any deficiency in the pleading in that regard no longer matters. (*People v. Williams* (1999) 21 Cal.4th 335, 346 [if the record shows the action is not time-barred, "the conviction will stand despite the prosecution's error in filing an information that appeared time-barred"].)

We therefore conclude Renderos has failed to state a prima facie case for relief based upon a claim that his trial counsel was ineffective for failing to object to any pleading defect.

B. Trial Counsel's Failure to Cross-Examine Witnesses

In his petition for habeas corpus, Renderos also argues his trial counsel was ineffective because counsel had no tactical reason for failing to cross-examine Lisa and Ryan on the following grounds: (1) Renderos had lent money to Lisa, which she did not want to repay to him or (2) Ryan planned to file a civil action for monetary damages if Renderos was convicted. According to Renderos, his trial counsel intended to question the witnesses about their financial motives but he overlooked the issue during cross-examination. Renderos further argues had his counsel so questioned the witnesses, the jury would have learned both Lisa and Ryan had considerable financial motives to fabricate allegations of molestation.

To establish ineffective assistance of counsel, the defendant "must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations]; or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.]" (*In re Visciotti, supra,* 14 Cal.4th at pp. 351-352.) The rule of per se reversal in cases where counsel fails to subject the prosecution's case to adversarial testing is narrowly applied. "Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage." (*Id.* at p. 353.) Renderos does not contend this case meets that strict standard. He claims only a more favorable outcome was reasonably probable had his counsel not performed ineffectively by failing to cross-examine the witnesses on their financial motives. Ultimately, " '[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*Id.* at pp. 351-352, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686; accord, *In re Cudjo* (1999) 20 Cal.4th 673, 687.)

We accept, for the purpose of argument, that defense counsel had no "tactical reason" for not questioning Ryan and Lisa regarding any financial motives for their testimony, and counsel meant to question the witnesses but he merely forgot. Nevertheless, in determining whether counsel's failure was prejudicial, we evaluate the entire record, not the single error in isolation. Defense counsel did impeach both Ryan and Lisa, noting their recollections of the events in question were contradictory, there was a lack of corroborative physical evidence, and Ryan's trial testimony was contradicted by his earlier statements to the police. To the extent defense counsel could or should have questioned the witnesses about their financial motives for pursuing charges against Renderos, defense counsel's failure to so question the witnesses does not "undermine [our] confidence in the outcome." (*People v. Riel* (2000) 22 Cal.4th 1153, 1175.) The testimony of the witnesses would have helped only if the witnesses admitted Lisa owed a debt to Renderos that she did not want to repay, and at the time of trial, Ryan was planning to file a civil lawsuit for monetary damages. However, Lisa was not a percipient witness to any of the acts of sexual molestation and her testimony was not critical to Renderos's convictions. Although Ryan's credibility was central to the case, there was independent evidence that corroborated his allegations, namely, Renderos's telephone statements. Thus, it is highly unlikely a jury would draw such a negative inference from the filing of a civil lawsuit for damages or a dispute over money owed to Renderos that it would have acquitted him. We cannot say the verdict was "rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." (*Strickland v. Washington, supra,* 466 U.S. at p. 702.) Accordingly, Renderos has not established a prima facie case for relief based upon his trial counsel's failure to question the witnesses about their financial motives for testifying against him.

DISPOSITION

The motion for summary reversal is denied, the judgment is affirmed, and the petition for a writ of habeas corpus is summarily denied.

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Parrilli, J.

We concur:

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McGuiness, P. J.

_____
Corrigan, J.

Trial Court:	Solano County Superior Court
Trial Judge:	Hon. Mike Nail
Counsel for Appellant:	Robert J. Beles Paul McCarthy
Counsel for Respondent:	Bill Lockyer, Attorney General; Robert R. Anderson, Chief Assistant Attorney General; Gerald A. Engler, Senior Assistant Attorney General; Catherine A. Rivlin, Supervising Deputy Attorney General; Gregg E. Zywicke, Deputy Attorney General